No. 10,597

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FRED J. ROGERS, MIRON RUSTIGIAN and HAGOOHI RUSTIGIAN,

Appellants,

vs.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION (a corporation),

Appellee.

APPELLANTS' OPENING BRIEF.

MATT GOLDSTEIN,
Brix Building, Fresno 1, California,
Attorney for Appellants.

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PRELIMINARY STATEMENT.

This is an appeal from an order of the District Court of the United States upon review of an order of a Conciliation Commissioner acting as a referee in bankruptcy of said court reversing an order of said Conciliation Commissioner which awarded to Fred J. Rogers, one of the appellants, the sum of $1500.00 on account of counsel fees for legal services rendered to the appellants, Miron Rustigian and Hagoohi Rustigian, the bankrupts (sometimes designated in the rec-

(NOTE): All italics in this brief are the writer's unless otherwise indicated.

ord as the debtors). After the order of adjudication was made, one E. B. Campbell (as agent and on behalf of Bank of America N. T. and S. A.) had instituted an action in the Superior Court, Madera County, California against the bankrupts to quiet the bankrupts' title to and to divest the bankrupts of all their right in and ownership of the real property on which they had predicated their status as farmer bankrupts and of which they remained in possession under Sec. 75 (s) of the Bankruptcy Act. Fred J. Rogers, attorney for the bankrupts in possession, associated himself with two attorneys, Frank Curran and David E. Peckinpah, in defense of the action. The trial resulted in a verdict for the defendants, farmer bankrupts, although thereafter the trial court granted a new trial. After the trial was concluded, and on June 29, 1942, the bankrupts petitioned the Conciliation Commissioner (acting as referee in bankruptcy) for an order authorizing payment of the sum of $1500.00 to Fred J. Rogers and his associated attorneys on account of counsel fees. Objections to the payment of said fees were filed by Security First National Bank of Los Angeles, a secured creditor, and Bank of America N. T. & S. A. The Conciliation Commissioner made an order on November 25, 1942, authorizing payment to Fred J. Rogers, alone, of the sum of $1500.00 as attorneys' fees for the services rendered by all three of the attorneys, and that sum was paid to him.

Thereafter Bank of America N. T. & S. A. filed a petition to review said order, and on July 23, 1943

the United States District Court reversed said order of the Conciliation Commissioner and directed the appellant, Fred J. Rogers, to repay to the estate the sum of $1500.00, which had previously been paid to him pursuant to said order. From the judgment of reversal of the United States District Court, this appeal is taken by the bankrupts and Fred J. Rogers.

STATEMENT AS TO JURISDICTION AND OF THE CASE.

The facts of the case are not particularly involved. (References are made hereinafter to the printed transcript.)

On or about the 18th day of May, 1940, Miron Rustigian and Hagoohi Rustigian filed a petition under section 75 of the Bankruptcy Act alleging that they were personally engaged primarily in farming operations and asking for leave to effect a composition or extension of time to pay their debts under said section (Tr., pp. 2-4). On May 18th, 1940, the petition of the debtors was approved and the matter was referred to John D. Boyle, Esq., one of the Conciliation Commissioners of the court (Tr., pp. 4-5). On August 20th, 1940, the said debtors filed an amended petition under section 75s of the Bankruptcy Act to be adjudicated bankrupts in accordance with the provisions thereof and to be allowed to retain possession of their property under the supervision and control of the court (Tr., pp. 6-8). Thereafter and on August 23rd, 1940, an order of adjudication, reference and

temporary restraining order under section 75s of the Bankruptcy Act was entered, referring the matter to the Conciliation Commissioner for Madera County, California, to act as referee in bankruptcy of said court (Tr., pp. 8-9). The said John D. Boyle resigned as Conciliation Commissioner and on January 26th 1942, the matter was referred to Herbert McDowell as Conciliation Commissioner (Tr., p. 10).

On June 29th, 1942, a petition was filed by the debtors for an order authorizing the payment of $1500.00 on account of counsel fees to three attorneys, Fred J. Rogers, attorney for the debtors, Frank Curran and David Peckinpah (Tr., pp. 14-18). The petition stated that on November 27th, 1941, E. B. Campbell had filed an action against the bankrupts (and one Harry Rustigian) to quiet title to the property upon which the bankrupts predicated their status as farmers. The petition set forth that the services of the three attorneys above named were rendered in resisting the action (which was really brought on behalf of Bank of America N. T. & S. A.) (Tr., p. 15) and further stated that at the trial "the jury brought in and rendered a verdict in favor of these debtors" (Tr., pp. 15-16). Objections to said petition were thereafter filed by Security First National Bank of Los Angeles, a secured creditor (Tr., pp. 18-25) and by Bank of America N. T. & S. A. Said Bank of America made no claim that it was a creditor, lienor of a creditor or that it had any interest in this proceeding except as a claimant to the real property upon which the bankrupts predicated their status as

farmers "since May 24, 1940" (Tr., p. 26) and that "the title to said real property is at this time the subject of pending litigation" (Tr., p. 26).

Upon the issues raised by the petition and the objections filed, the matter came on for hearing before the Conciliation Commissioner acting as a referee on August 14th, 1942 (Tr., p. 12; p. 30). Evidence was taken in support of the petition (Tr., pp. 38-80), the witnesses being cross-examined by the attorneys representing Security First National Bank of Los Angeles and Bank of America N. T. & S. A.

The testimony was to the effect that Frank Curran began his preparation about a month before the trial, and that for almost two weeks before the trial he devoted himself exclusively to preparation (Tr., pp. 39 and 40). He also spent three days on the jury trial of the case (Tr., p. 40). Thereafter, findings of fact and conclusions of law were prepared (Tr., p. 41). David E. Peckinpah spent approximately 35 to 40 hours before trial in preparation (Tr., pp. 62 and 63), and three days on the trial (Tr., pp. 49 to 63). Fred J. Rogers spent approximately ten days preparing for trial (Tr., p. 79). He also participated in the trial of the case (Tr., p. 58).

The testimony further showed that the services of counsel were of great benefit to the estate. By obtaining a favorable verdict, the property of the estate has been preserved; the bankrupts have been enabled to pay for its maintenance and upkeep, and monies have been realized and applied to the payments of the bankrupts' obligations (Tr., pp. 45 and 46).

The testimony further showed that the Conciliation Commissioner was at all times kept informed of the retention of counsel and was conferred with by the appellant, Fred J. Rogers, prior to the retention of Frank Curran and David E. Peckinpah (Tr., pp. 70 to 74). The Conciliation Commissioner stated upon the hearing that he advised Mr. Rogers (Tr., p. 72),

> "that there would be only one attorney's fee paid, and this court wouldn't make any arrangements as to its amount, character or anything of that character, only that it would allow what was shown on a petition as to knowledge exercised and responsibility assumed and work done."

Further:

> "The Conciliator. Well, Mr. Rogers did tell me who he was going to employ. As to the amount to be paid, there was no discussion. We didn't consider such discussion, but as to the gentlemen who were going to be employed, I assured him that the check would have to be drawn in one—I didn't intend to break up any check" (Tr., p. 73).

He further stated:

> "The Conciliator. But I did tell him that also he was justified in going ahead and getting them to help him" (Tr., p. 73).

It was admitted by the appellant, Fred J. Rogers, that no written petition was presented to the Commissioner and that no formal order was made by this Commissioner authorizing the retention of counsel to defend the action (Tr., pp. 69 and 70).

Following said hearing, the Conciliation Commissioner on November 25, 1942 made his order granting the petition to the extent of allowing to appellant, Fred J. Rogers, the sum of $1500.00 on account of attorneys' fees for entire services so rendered by the three attorneys (Tr., pp. 30, 31).

The certificate of review of the Commissioner shows that "through inadvertence" the Conciliator failed to make findings of fact and conclusions of law and requested that the matter be referred back to him "for the purpose of making findings of fact and conclusions of law (Tr., p. 12). Only Bank of America N. T. and S. A. petitioned to review said order (Tr., pp. 32 to 38). Upon review the District Court reversed the order of the Referee and directed appellant Fred J. Rogers to repay to the estate the sum of $1500.00 (Tr., pp. 88 and 89). The District Court also rendered an opinion in connection with the making of said order (Tr., pp. 83 to 88).

The jurisdiction of this court to review the order and judgment of the District Court is based upon Section 24 of the Bankruptcy Act 11 U. S. C. A., Section 47, as revised and amended by the Chandler Act of June 22, 1938; Judicial Code, Section 128 (28 U. S. C. A., Section 225). Notice of appeal duly filed (Tr., pp. 89, 90). Designation of portions of record, proceedings and evidence contained in the record on appeal (Tr., pp. 97 to 99).

PERTINENT STATUTORY PROVISIONS.

1. Sec. 1, sub. 9 of the Bankruptcy Act, Title 11 U. S. C. Ch. 1 provides:

> " 'Court' shall mean the judge or *the referee of the court of bankruptcy* in which the proceedings are pending;"

2. Sec. 75 (s), sub. 4 of the Act, Title 11 U. S. C. Ch. 203 provides in part:

> "The *Conciliation Commissioner,* appointed under subsection (a) of Sec. 75 of this Act, as amended, *shall* continue to *act,* and act *as referee,* when the *farmer debtor* amends his petition or answer, asking to be adjudged a bankrupt under the provisions of subsection (s) of Sec. 75 of this Act, and continue so to act until the case has been finally disposed of."

3. Order 50, sub. 11, of the General Orders in Bankruptcy of the Supreme Court of the United States provides in part:

> "In so far as is consistent with the provisions of Sec. 75 and of this General Order, the conciliation commissioner shall have all the powers and duties of a referee in bankruptcy and the general orders in bankruptcy shall apply to proceedings under said section. * * *"

4. Order 44 of the General Orders in Bankruptcy of the Supreme Court provides in part:

> "No attorney for a receiver, trustee or *debtor in possession* shall be appointed except upon the order of the court, which shall be granted only upon the verified petition of the receiver, trustee or debtor in possession, stating the name of the

counsel whom he wishes to employ, the reasons for his selection, the professional services he is to render, the necessity for employing counsel at all, and to the best of the petitioner's knowledge all of the attorney's connections with the bankrupt or debtor, the creditors or any other party in interest, and their respective attorneys. * * *"

5. Sec. 75 (b) of the Bankruptcy Act, Title 11 U. S. C. Ch. 203 provides in part as follows:

"The Supreme Court is authorized to make such general orders as it may find necessary properly to govern the administration of the office of conciliation commissioner and proceedings under this section; but *any district court* of the United States *may, for good cause* and *in the interests of justice, permit any such general order to be waived.*"

6. Sec. 75 (s), sub. 1, of the Bankruptcy Act, Title 11 U. S. C. Ch. 203, provides in part:

"After the value of the debtor's property shall have been fixed by the appraisal herein provided, the referee shall issue an order setting aside to such debtor his unencumbered exemptions, and his unencumbered interest or equity in his exemptions, as prescribed by the State law, and shall further order that the possession, under the supervision and control of the court, of any part or parcel or all of the remainder of the debtor's property shall remain in the debtor, as herein provided for, subject to all existing mortgages, liens, pledges, or encumbrances. * * *"

7. Sec. 75 (n) of the Bankruptcy Act, Title 11 U. S. C. Ch. 203, provides in part as follows:

"The filing of a petition or answer with the clerk of court, or leaving it with the conciliation commissioner for the purpose of forwarding same to the clerk of court, praying for relief under Sec. 75 of this Act, as amended, shall immediately subject the farmer and all his property, wherever located, for all the purposes of this section, to the exclusive jurisdiction of the court, including all real or personal property, or any equity or right in any such property, * * *."

8. Sec. 75 (o) of the Bankruptcy Act, Title 11 U. S. C. Ch. 203, prohibits creditors of the bankrupt, or other persons, from collecting any demands or debts, or from filing of foreclosure of any liens, mortgages, or encumbrances against said land. The prohibitions of this section are further amplified by Sec. 75, subd. (p) of the Bankruptcy Act, Title 11 U. S. C. Ch. 203, which reads as follows:

"The prohibitions of subsection (o) shall apply to all judicial or official proceedings in any court or under the direction of any official, and shall apply to all creditors, public or private, and to all of the debtor's property, wherever located. *All such property shall be under the sole jurisdiction and control of the court in bankruptcy,* and subject to the payment of the debtor farmer's creditors, as provided for in Sec. 75 of this Act."

9. Sec. 39 (c) of the Bankruptcy Act, Title 11 U. S. C. Ch. 68, provides in part as follows:

"A *person aggrieved by an order of a referee* may, within ten days after the entry thereof or within such extended time as the court may for cause shown allow, file with the referee a petition

for *review* of such order by a judge and serve a copy of such petition upon the adverse parties who were represented at the hearing."

QUESTIONS PRESENTED BY THE APPEAL.

1. Was the Bank of America an aggrieved party within the meaning of Sec. 39 (c) of the Bankruptcy Act, and, as such, entitled to review the order of the Conciliation Commissioner awarding attorneys' fees?

2. Was the District Court justified in disturbing the exercise by the Conciliation Commissioner (acting as a referee) under Sec. 75 (b) of the Bankruptcy Act of his power to waive compliance with the General Orders in Bankruptcy upon good cause shown and in the interests of justice?

3. Under all the facts and circumstances shown in the record, did the District Court err in not waiving compliance with Order 44 of the General Orders in Bankruptcy?

STATEMENTS OF POINTS AND SPECIFICATIONS OF ERRORS RELIED UPON.

1. That the District Court erred in reversing the order of the Conciliation Commissioner awarding counsel fees.

2. That the District Court erred in entertaining the petition of the Bank of America to review the order of the Conciliation Commissioner.

3. That the District Court erred in refusing to dismiss the petition filed by the Bank of America to review the order of the Conciliation Commissioner awarding counsel fees.

4. That the District Court erred in reversing on review the exercise by the Conciliation Commissioner of the discretion vested in him by Sec. 75 (b) of the Bankruptcy Act, permitting him to waive compliance with the General Orders in Bankruptcy upon good cause shown and in the interests of justice.

5. That the District Court erred in failing to waive compliance with Order 44 of the General Orders in Bankruptcy upon good cause shown and in the interests of justice.

ARGUMENT.

CATEGORICAL A.

1. Bank of America N. T. & S. A. was not an aggrieved party within the meaning of Section 39 (c) of the Bankruptcy Act.

In the objections which were filed by the Bank of America (Tr., pp. 26 to 30) and in its petition for review (Tr., pp. 32 to 38) there is *not a single statement of fact* showing the merits of its alleged claim of title to the farmer bankrupt's property. Both contain only the bare and wholly unsupported statement that title is *claimed* by the bank (Tr., p. 26) and that the bank's claim of title is "the subject of pending litigation" (Tr., p. 26). The bank offered *no testimony whatsoever* upon the hearing before the Con-

ciliation Commissioner *to support its alleged claim of title.*

The Bank of America finds itself in the anomalous and inconsistent position of being both a friend and a foe to the bankruptcy proceedings. On the one hand, it seeks by hostile and adverse litigation to annihilate and destroy the estate in bankruptcy by stripping it of its principal asset, and on the other, it has entered the bankruptcy proceedings for the purpose of resisting payment of fees to the attorneys who have, thus far, successfully resisted the bank's attempt to destroy the estate in bankruptcy.

The real question, therefore, is whether one who is neither creditor, lienor, nor assignee of a creditor, nor has filed any claim in the bankruptcy proceedings itself, but who has made an adverse, hostile, and wholly unsupported claim to the assets of the bankrupts' estate, has the standing of an aggrieved party, so as to be entitled to review orders made by the Conciliation Commissioner (whether erroneous or correct) in the ordinary course of administration. As is pointed out elsewhere, no creditor or party who has filed a claim in the conciliation proceedings asked for the review of the referee's order.

We have been able to find no authority sustaining the bank's right of review, and there is much authority supporting a contrary view.

In *In re Snyder,* 4 Fed. (2d) 627, an order had been made by the District Court reopening the bankrupt's estate in order that the trustee might sue a

third party in whose name it was alleged real property stood, which belonged to the bankrupt. The third party, against whom the suit was authorized, sought to vacate the order. Its motion was denied, and it subsequently appealed. This court dismissed the appeal, stating in its opinion:

> "The appellant's interest, to suffice, must be a *direct* and *immediate* pecuniary interest in the particular cause, and it is not sufficient that he is interested in the question litigated, *or that, by the determination of the question litigated, he may be a party to some other suit,* growing out of the decision of that question. * * * If the petitioner has a legal right to review an order of this kind, we see no reason why every person, against whom a suit is authorized by a referee in bankruptcy, may not review the order authorizing the suit, even up to the Circuit Court of Appeals." (p. 628.)

In *James v. Reconstruction Finance Corporation,* 122 Fed. (2d) 807, appellant had applied for an order directing the trustees of an insolvent railroad corporation to make payment on its certificates. Its application was denied, and it appealed. This court dismissed the appeal upon the ground that the appellant was not an aggrieved party, the court stating:

> "Appellant did not own or hold any of the certificates mentioned in the order. All were owned and held by Reconstruction Finance Corporation. * * * Thus the party—and we think the only party—adversely affected by the order was Reconstruction Finance Corporation, and it has not

> appealed. Whether or not it might have been appealed need not be decided. * * *
>
> It is immaterial, if true, that appellant before filing its motion had sought and obtained permission to intervene, and thus had become a party to the proceeding; for even a party may not appeal from a judgment or order unless he has *some interest* in the *subject matter thereof.*" (p. 808.)

In *In re Clark,* 35 Fed. Supp. 722, a creditor of the bankrupt whose claim had been disallowed because it was filed after the expiration of the time to file claims, sought the review of an order of a referee authorizing the trustee to compromise a claim against the estate. The creditor had previously filed objections to the approval of the compromise. Its attempt to review the order was dismissed, the court stating:

> "This order of the referee merely affects the distribution of the estate of the bankrupt in the hands of the trustee and the amount to be received by each creditor who is entitled to participate therein. * * * There can be no prejudicial error without injury, and as the Company is not permitted to participate in the present anticipated distribution of the bankrupt's estate, it is not in a position to complain of any order relating to the manner and extent of payments *to creditors who have filed Proofs of Claim, none of whom attack the order of the referee.*" (pp. 723-724.)

In *In re Patterson McDonald Shipbuilding Company,* 288 Fed. 546, an attempt made by a creditor whose claim was disallowed to appeal from an order allowing a salary to an officer of a bankrupt corpora-

tion for services rendered by him to the trustee in bankruptcy was dismissed, because the appellant did not have "the status of a creditor".

In *In re Rose,* 86 Fed. (2d) 69, a bankrupt farmer had attempted to appeal from an order denying the petition of the Conciliation Commissioner for a stay of a state court action brought against the farmer bankrupt. The court dismissed the appeal, holding that even though the bankrupt's property was affected by the order, she was nevertheless not an aggrieved party, stating in part:

> "Amicus Curiae apparently contend that, because appellant filed the petition, she was a party to all collateral proceedings which might arise in the main proceeding. If that is the contention, it is untenable, because *many issues arise in the administration of a bankrupt's estate, in which the bankrupt cannot even remotely be interested, for example, controversies between the trustee and the creditors."* (p. 71.)

In *In re Weidenfeld,* 254 Fed. 677, the court held that the bankrupt could not appeal from an order directing an examination of his wife, because he was not "the party aggrieved within the meaning of section 24 (b)" of the Bankruptcy Act.

In *In re Brown,* 87 Fed. (2d) 309, the court held that the bankrupt has no standing to appeal from an order denying creditors leave to intervene in the proceedings.

The bank could, under no theory, participate in any dividends or distribution of the assets of the bank-

rupt by the bankruptcy court. Yet, the award of counsel fees could, in the final analysis, affect only the dividends and distribution to creditors. To permit one who is a stranger (and a hostile one at that), and who cannot share in the distribution of the bankrupt's property, to disturb and review orders made in the ordinary course of administration can lead only to chaos and confusion in estate administration.

2. The authorities relied upon by the District Court do not support the bank's position.

The District Court relied upon Section 24 of the Bankruptcy Act and *Hewitt v. Berlin Machinery Works,* 194 U. S. 296, and *Gibbons v. Goldsmith,* 222 Fed. 826, in support of its holding that the Bank of America was an aggrieved party entitled to review the Conciliation Commissioner's order. We respectfully submit that none of them are in point.

Neither Section 24 (which deals with appellant's jurisdiction) nor the cases cited have any reference to the right of a stranger to the proceeding to review *administrative orders.*

In the *Hewitt* case, supra, the question was whether an appeal could be taken by the trustee from an order made by the bankruptcy court directing that the trustee should surrender certain of the assets of the bankrupt to a conditional vendor. The court held that the contest between the conditional vendor and the trustee was a "controversy in bankruptcy", and the trustee had a right to appeal from the order. Not even remotely, did the court there consider the question as to whether the third party could have appealed

from a purely administrative order, having no relation to the particular "controversy in bankruptcy" with the trustee.

Similarly in the *Gibbons* case, supra, the question was whether a proceeding brought by the trustee against the bankrupt's wife to determine title to property in which she claimed a community interest was a "controversy in bankruptcy". The court held that it was, and that the bankruptcy court had jurisdiction to determine the wife's claim. The court was there not called upon to consider and did not consider the rights of third party claimants to review administrative orders made by a referee in bankruptcy.

B. THE DISTRICT COURT ERRED IN DISTURBING THE WAIVER BY THE CONCILIATION COMMISSIONER OF COMPLIANCE WITH ORDER 44 OF THE GENERAL ORDERS IN BANKRUPTCY.

While the order of the Commissioner makes no specific statement that he waived compliance with General Order 44 of the Bankruptcy Act (no findings of fact or conclusions of law having been made) such waiver is implicit in his order.

The word "court" as used in the Bankruptcy Act also includes a "referee in bankruptcy" (Sec. 1, subd. 9, Bankruptcy Act). In proceedings under Sec. 75 (s) of the Act, the Conciliation Commissioner has all the rights and powers of a referee in bankruptcy (Sec. 75 (s), subd. 4, Bankruptcy Act, Order 50, General Orders in Bankruptcy).

In *Federal Land Bank of Louisville v. Castanien,* 116 Fed. (2d) 589, the court stated with reference to powers of Conciliation Commissioner as follows:

> "It would seem to be clear, from consideration of the foregoing sections, that except where otherwise specifically provided, a Conciliation Commissioner is clothed by the Act with all the jurisdiction and powers of a referee, and *that whatever the court may do,* the Commissioner may do, unless the power to be exercised is conferred not upon the court as such, but upon the judge. There is nothing novel in this concept. Within the meaning of old sections 23, sub. b and 60, sub b, 11 U.S.C.A. sections 46, sub b, 96, sub. b, 'Courts' are taken to include the referee, MacDonald v. Plymouth Trust Co., 286 U.S. 263, 268, 52 S. Ct. 505, 76 L. Ed. 1093; In re Pottasch Bros. Co., 2 Cir., 79 F. 2d 613, 101 A.L.R. 1182. A Conciliation Commissioner is clearly a referee. While he is a particular kind of referee, and while to him are referred the supervision and liquidation of the estates of farmer-debtors only, it would seem that within such limits he exercises all of the jurisdiction and authority with which general referees are clothed. * * *"

The General Orders in Bankruptcy apply to provisions under Sec. 75 of the Bankruptcy Act, Order 50, sub. 1, General Orders in Bankruptcy.

Congress has made a special exception of proceedings under Sec. 75 of the Act, insofar as the General Orders in Bankruptcy are concerned. It specifically permits waiver by the District Court of the Orders in Bankruptcy "for good cause shown and in

the interests of justice'' Sec. 75 (b) of the Bankruptcy Act.

This is a frank recognition of the highly informal manner in which farmers' property is administered under the Act, and that courts in administering the Act should look to the substance rather than to the form.

No claim is here made, and nothing in the record suggests that the payment of attorneys' fees in this matter would violate the spirit of the Bankruptcy Act, or any of its General Orders. The Conciliation Commissioner at all times knew and, in fact, authorized the retention of counsel to defend the action brought by the bank (Tr., pp. 72-73). True it is that the authority given by him to retain counsel was oral, informal and embodied in no written orders. Yet it is equally true that in reliance thereof the attorneys rendered valuable services to the estate, have protected the estate from destruction by the bank and have enabled the farmer bankrupt to keep his farm, maintain his property and pay his debts.

The District Court reversed the Commissioner's order and denied payment of attorneys' fees primarily because of the failure to obtain a formal order of retention, as required in Order 44 of the General Orders in Bankruptcy (Tr., p. 87). We believe that the salutary provisions of Sec. 75 (b) of the Bankruptcy Act render it proper for the Commissioner, acting as referee of the bankruptcy court, to waive compliance with that order, and that his discretion should not have been disturbed by the District Court.

The ends of justice would be far better served by paying reasonable fees to attorneys in a *situation such as this, than be denying such payment.*

C. THE DISTRICT COURT IN THE INTERESTS OF JUSTICE SHOULD HAVE WAIVED COMPLIANCE OF ORDER 44 OF THE GENERAL ORDERS IN BANKRUPTCY.

Those things which we have said earlier in this brief with reference to the exercise by the referee (as an arm of the bankruptcy court) of his discretion to waive compliance with Order 44 apply with equal force to the order of the District Court. Nowhere in its opinion did the court suggest any equitable reasons why attorneys' fees should not have been allowed and paid. We can conceive of no case in which the equities in favor of payment of attorneys' fees could have been stronger. No creditor complains of the order. If the benign provisions of Sec. 75 (b) of the Bankruptcy Act were not intended to cover such a case as this, then what is its purpose?

D. THE FARMER BANKRUPTS WERE PROPER PARTIES TO PETITION FOR ATTORNEYS' FEES.

Under Sec. 75 of the Bankruptcy Act and its various subdivisions, the farmer debtor or the farmer bankrupt (as the case may be) is, in effect, his own trustee. He alone retains possession of his property under the supervision and control of the Conciliation Commissioner. Sec. 75 (s) subds. 1 and 2 of the

Bankruptcy Act. Nowhere in Sec. 75 (s) is provision made for the election of a trustee in bankruptcy, as in other bankruptcy cases. The defense of any suit brought against the bankrupts or their estates must, of necessity, be made by the farmer bankrupts under the supervision and control of the Conciliation Commissioner. Since the farmer bankrupt is required by the Act to surrender all his assets (except exempt property) (Sec. 75 (s), sub. 1, Bankruptcy Act) and to place them under the control of the Conciliation Commissioner, the estate in bankruptcy is the only available source from which attorneys' fees can be paid for defending the farmer bankrupt's title against attack from third parties.

In ordinary bankruptcy proceedings an action such as was instituted by the bank would be defended by a trustee in bankruptcy. In proceedings under Sec. 75, his role is filled by the farmer bankrupt under the supervision of the Conciliation Commissioner.

CONCLUSION.

The order of reversal of the District Court does not take into consideration the announced purpose of Congress to permit farmer debtors and farmer bankrupts proceedings to be administered with informality and with a view to serving the ends of justice rather than strict adherence to the rules of procedure.

In any event, there is not the slightest legal or equitable basis upon which the Bank of America may

review this particular administrative order of the Conciliation Commissioner. To say that it may do so, is to permit similar interference at every stage of the proceedings with administrative orders for the payment of debts, mortgages and the claims of creditors of the farmer bankrupts. This would open the door to every adverse party who has made a claim to the assets of the bankrupt to interfere with the orderly administration of the bankrupt's affairs. Such a precedent must inevitably lead to chaos and confusion in bankruptcy matters.

This court should reinstate the order of the Conciliation Commissioner upon the grounds set forth in this brief and should reverse the order of the District Court.

Dated, Fresno, California,
December 27, 1943.

Respectfully submitted,
MATT GOLDSTEIN,
Attorney for Appellants.